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No. 94-645

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

VICTOR POSNER,

*Petitioner,*

v.

SECURITIES AND EXCHANGE COMMISSION,

*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF IN REPLY TO RESPONDENT' S OPPOSITION TO THE PETITION FOR CERTIORARI

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## QUESTION PRESENTED

Whether the federal courts can, without statutory authority, permanently ban an individual from serving as an officer or director of any publicly-held corporation in the United States, and grant other forms of relief?

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## BRIEF IN REPLY TO RESPONDENT'S OPPOSITION TO THE PETITION FOR CERTIORARI

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## INTRODUCTION

The SEC's lengthy brief in opposition does not deflect the force of the pivotal point in this case: the Second Circuit ordained an expansion of judicial power beyond any traditional limit. Corporate governance is too important a subject to allow judges and regulators to impose, without justification or authority, their own moral vision of a better world. Review is warranted in this highly publicized case to restore the

appropriate limits of judicial power in a representative democracy governed by law, not ukase.

## ARGUMENT

The SEC predictably portrays this case as bound to its facts and raising "no issue of general or continuing legal importance." (Opp. 9). The exercise of judicial power perforce operates on a particular set of facts; yet this Court has deemed other individual assertions of judicial power important enough to the law to warrant review. *See Spallone v. United States*, 493 U.S. 265 (1990). Just as *Spallone* was about more than the Yonkers city council, this case is about more than Victor Posner. This case is about the power of American investors to control their investments and of the several States to govern corporations without interference from energetic federal courts or hyperkinetic federal regulators.

This case presents a rare instance where a court of appeals sanctioned a district court's transgression of not one but all of the fundamental limits on federal judicial power. *First*, under the guise of approving an exercise of the "necessary power to fashion an appropriate remedy," the Second Circuit embraced far-reaching visions of judicial power to order duplicative and extreme punishments against individuals found to violate the securities laws. (Pet. 10-13). The SEC suggests that the courts below carefully exercised only those necessary powers, but does not suggest that the district court tailored its "remedies" in any way. Rather, the SEC argues that the Second Circuit need not have required the

district court to choose anything but the broadest, most Draconian punishment.[1] That is dangerously, provocatively wrong.

*Second*, the Court of Appeals approved an unprecedented punishment imposed under cover of the judiciary's inherent power. (Pet. 14). The SEC does not quarrel with the proposition that precedential authority is important in evaluating an exercise of inherent power. Here, *no* authority supports the district court's actions: *no court* has ever imposed a permanent, unconditional director/officer bar. Although many consent decrees have included permanent director/officer bars, the decisions of this Court are pellucidly clear in this respect: a court may not impose remedies as broad as those it can approve through a consent decree. *See Local No. 93, Int'l. Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 526 (1986). The SEC, in short, is delighted to accept the Second Circuit's expansion of its power notwithstanding this Court's clear pronouncements to the contrary.

*Third*, the Second Circuit turned a blind eye to the district court's intrusion into state law of corporate governance. (Pet. 15-16). Although this Court repeatedly has held that federal law ought not displace state corporation law absent a clear statement from the Article I branch, *see Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977), the Second Circuit blithely ignored petitioner's argument to that effect. The district court's order does not merely have "an incidental impact on the governance of those corporations." (Opp. 16). Rather, the court has imposed a strict *federal* qualification for corporate office: Victor Posner, an extraordinarily skilled

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[1] *See* Opp. 14 (defending duplicative punishments of voting trust and director/officer bar); Opp. 15 & n.18 (defending disgorgement of all earnings at Fischbach, even though Posner performed compensable services for Fischbach). The SEC does not even attempt to defend the district court's order that Posner repay gross income from Fischbach, even though Posner had paid income taxes on that amount. *See* Pet. 13 n.7.

entrepreneur, may not serve any corporation in the country even if he is duly chosen by fully-informed investors.

*Fourth*, the Second Circuit approved the district court's expansive power when only a limited and long-past federal violation was at issue. (Pet. 11 & n.5). Not a shred of evidence pointed to any violation of federal law between the mid-80's and the time of trial. Recognizing this, the SEC belatedly throws extra-record mud, suggesting that there was evidence of corporate mismanagement up to the date of trial (Opp. 4 n.3). This will not do. Corporate mismanagement—at least as perceived by the SEC's staff—is emphatically not a subject of federal law. Federal law prohibits fraud in the sale of securities, and requires disclosure of beneficial ownership of securities. *See* 15 U.S.C. §§ 78j(b), 78m(d) (1988); 17 C.F.R. §§ 240.10b-5, 240.13d-1 (1993). But nothing in the securities laws governs what the SEC deems "abuse of public corporations" or "unlawful extraction of funds" from corporations. (*Id.*). The SEC and the federal judiciary have not been commissioned with roving authority to cure what they see as corporate mismanagement. That is the province of state corporate law.

*Finally*, the Second Circuit ignored the dictates of Congress on the issue of permanent director/officer bars. (Pet. 16-21). Congress decided to make the extreme remedy of a permanent bar available only *prospectively* in the Remedies Act. Notwithstanding that clear declaration, the district court applied the Remedies Act *retroactively*. The Second Circuit bypassed the statutory argument, and approved the district court's claim to an inherent power broader than what Congress was willing, after careful deliberation, to grant the judiciary.[2]

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[2] Respondent incorrectly argues that petitioner has waived the argument that the Second Circuit evaded the text of the Remedies Act. (Opp. 17). In fact, petitioner argued below that the combination of the Remedies Act and the limits on a court's inherent power prohibited the district court's actions. Although petitioner does not make the identical arguments that it did below,

(continued...)

Inherent judicial power was not, until now, considered a trump to carefully calibrated legislation.

In view of the foundational principles at issue and the immense importance of the underlying field of law, this case merits the attention of the Court.

## CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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[1] (...continued)
the issue presented to this Court and all of the arguments presented in the petition fall within the ambit of the general claim urged below.